IN THE SUPREME COURT OF THE STATE OF DELAWARE

NUVASIVE, INC., a Delaware Corporation, Plaintiff-Below/Appellant, v. PATRICK MILES, an individual, and ALPHATEC HOLDINGS, INC., a Delaware Corporation, Defendants-Below/Appellees.	)))))))))))))	No. 132,2025 Court below: Court of Chancery C.A. No. 2017-0720-SG

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NATURE OF PROCEEDINGS

In October 2017, after nearly two decades at NuVasive, Pat Miles resigned to lead what was then a much smaller, fledging company, Alphatec Spine, Inc. ("Spine"), and its parent company, a Delaware holding company known as Alphatec Holdings, Inc. ("Holdings"). NuVasive responded by launching a litigation campaign against Miles and the Alphatec companies, filing this suit just nine days after Miles resigned. NuVasive alleged that: (1) Miles violated his fiduciary duties to NuVasive, including by not affirmatively disclosing a passive personal investment that he had no obligation to disclose; and (2) Holdings impermissibly interfered with NuVasive's contracts with certain sales representatives and distributors. NuVasive then made the same allegations about sales representatives and distributors in a parallel action against Spine in California. But despite its aggressive campaign, and having had *six years* to gather evidence, NuVasive repeatedly failed to prove its claims—both in the Delaware Court of Chancery in a one-week bench trial against Holdings and Miles and in California state court in a six-week jury trial against Spine.

This appeal is the most recent step in NuVasive's crusade against Miles and the Alphatec companies and both of its appeal arguments are meritless. First, the trial court did not err in considering evidence related to Miles's reasons for not telling NuVasive about his passive investment in Holdings, and the court's finding that

Miles did not breach his duty of loyalty by not making such a disclosure is not clearly erroneous. Second, the trial court did not err in weighing the trial evidence and concluding that Holdings—a public company with no operations—is not liable for alleged misconduct by its operating subsidiary, Spine. NuVasive tries to frame these arguments as legal errors, but in reality, this appeal is NuVasive's airing of its dissatisfaction with the trial court's factual findings: the preponderance of the evidence did not prove that Miles breached his duty of loyalty or that Holdings is directly liable for the alleged actions taken by Spine's employees. Because NuVasive does not come close to establishing that the trial court was clearly erroneous in its findings, this Court should uphold the trial court's rulings and dismiss NuVasive's appeal.

SUMMARY OF ARGUMENT

I. MILES DID NOT BREACH HIS DUTY OF LOYALTY.

1. **Denied.** NuVasive's assertion that the trial court "excused" a breach of duty based on evidence related to why Miles did not disclose his investment to NuVasive misrepresents the trial court's opinion. Because good faith is a condition in any duty of loyalty claim, Miles's explanations for why he did not disclose the investment are relevant to the court's determination of whether any breach occurred in the first place. Evidence of why Miles did not affirmatively disclose the investment—including evidence that there was no contractual or Code of Conduct requirement to do so, evidence that the investment had no impact on NuVasive, evidence that Miles made the investment to support a friend (not to damage NuVasive), and evidence that Miles did not disclose it to avoid exacerbating a difficult relationship—proves that Miles did not act in bad faith or otherwise contrary to NuVasive's best interests and therefore did not breach his duty of loyalty.

2. **Denied.** News of Miles's permissible, insignificant and passive investment in Holdings is not the sort of information Miles knew or should have known that NuVasive would wish to have, and so Miles did not breach his duty of loyalty by not actively disclosing the investment.

II. ALPHATEC HOLDINGS WAS NOT LIABLE FOR ACTIONS TAKEN BY SPINE EMPLOYEES IN THEIR CAPACITY AS SPINE EMPLOYEES.

1. **Denied.** Holdings is a holding company that does not conduct any business operations, and as such, could not be liable for the alleged conduct. NuVasive's argument that the court failed to consider the legal doctrine of mistake as to the Holdings's employment contracts is a red herring to distract from the court's correct conclusion—the evidence presented at trial and common sense proved that Miles and Hunsaker "were acting on behalf of Spine, rather than its non-operating holding company" because "Holdings has no commercial operations." A1888 at n.52.

2. **Denied.** NuVasive waived its argument that Holdings financed the alleged conduct taken by its executives by failing to raise the argument sufficiently in its post-trial briefing. *See Oxbow Carbon & Minerals Holdings, Inc. v. Crestview-Oxbow Acquisition, LLC*, 202 A.3d 482, 502 n.77 (Del. 2019). Even if this Court finds the argument was not waived, it still fails. NuVasive's only evidence of Holdings's financing the alleged conduct is an equity "inducement plan," which provided Spine the ability to grant shares of Holdings, a publicly traded entity, to certain distributors. NuVasive only identified the inducement plan as influencing one distributor—Greg Soufleris in Florida. But, as the evidence reflects, the inducement plan was only adopted ***after*** Soufleris signed his distributor agreement

with Spine. A1146:20–A1147:10; A2797–2823. As such, the inducement plan cannot have induced Soufleris's breach. *See Aqua Connect, Inc. v. Code Rebel, LLC*, 2012 WL 1535769, at *4 (C.D. Cal. Apr. 27, 2012).

STATEMENT OF FACTS

Pat Miles serves as the executive chairman of Holdings and CEO of Spine. He started both roles in October 2017, after growing disappointed with NuVasive's trajectory and how he was treated by that company after nearly twenty years of service there. At the time Miles joined, Spine was a small, fledgling company.

Spine's parent company, Holdings, is a holding company registered in the State of Delaware. B0094; B0935 ¶ 4; A4286. As is minimally required by law, Holdings has only three officers—the chairman; the chief financial officer; and the general counsel and corporate secretary. A1030:4–21; A1031:1–18. Holdings has no other employees. A1030:22–24. Holdings owns all the stock of its four non-party subsidiaries: (1) Spine; (2) EOS imaging S.A.S.; (3) Alphatec International Holdings, Inc.; and (4) SafeOp Surgical, Inc., each of which focuses on a different set of products and spinal-surgery solutions. A4262. The subsidiaries are legally distinct from one another and from Holdings. A4286; B0936 ¶ 5. Unlike Spine, and its other subsidiaries, Holdings has no business operations whatsoever. B0936 ¶ 9; A4286; A1026:22–A1027:5. Holdings does not develop, manufacture, market, or sell spinal-surgery technologies. B0936 ¶¶ 6, 9; A1036:23–A1037:6. Holdings is not a party to any of the contracts at issue here. B0937–38 ¶ 16.

The alleged wrongdoing here involves purported conduct by Spine, a Holdings subsidiary. Spine is not a party to this action. B0937–38 ¶¶ 16, 19, 22.

Spine, founded in 1990, develops, manufactures, markets, and sells spinal-surgery technologies. A1035:14–A1036:13. Spine partners closely with surgeons to develop new technologies to improve surgical outcomes. Today, Spine has state-of-the-art labs and training facilities and hundreds of employees in engineering, product development, research, sales, and manufacturing. B0937 ¶ 14.

I. Facts Pertaining to Issue 1: Pat Miles Upheld His Fiduciary Duty to NuVasive.

Miles joined NuVasive in the early 2000s. A0554:8–10. Through his development of NuVasive's flagship eXtreme Lateral Interbody Fusion ("XLIF") procedure, Miles earned close, trusted relationships with hundreds of NuVasive's surgeon customers. B0886:17–23, B0887:8–15. As a result, Miles became the face of NuVasive within the surgeon community. B0858:19–B0859:4; B0887:9–15; B0888:14–B0889:12; B0916:11–B0918:19; B0933:10–20. Miles served as NuVasive's Executive Vice President, Global Products and Services, from 2011 through January 2015, when NuVasive promoted him to President and COO.

In May 2015, Greg Lucier became Chairman and CEO of NuVasive. B0883:11–B0884:4. Lucier had no experience in spine (or any surgical field) and no existing surgeon relationships. A0586:14–A0587:19; B0879:16–B0881:16; B0885:21–24. Instead of prioritizing the product development or innovation that historically drove NuVasive's growth and attracted surgeon customers, Lucier focused on the "business" management side of things—revenue, costs, EBITDA, stock price. A0589:18–A0590:13; B0882:6–21; B0927:2–18; B0928:14–23; B0929:7–18; B0930:14–B0931:6.

In January and February 2016, NuVasive evaluated an opportunity to acquire Spine, which was on the verge of bankruptcy. A2042; B0908:16–24. In February 2016, NuVasive's management unanimously agreed that Spine would not be a good acquisition. A0604:10–A0622:24; A2013–A2057; B0145–B0242.

Following NuVasive's decision to forgo the acquisition of Spine, in March 2016, an independent, third-party investor group called Carlsbad Growth Partners ("Carlsbad") approached Miles and others to invest in Holdings and ultimately to lead Spine if the Holdings Board were to accept Carlsbad's proposal. A0623:7–A0648:13; A1058:4–A1062:6; A1962:18–A1963:18. Carlsbad recruited Miles for a few months, envisioning in its proposal that Miles would serve as CEO. A0623:7–A0648:13; A2182–85. The Holdings's Board rejected third-party Carlsbad's proposal in July 2016. A1061:9–A1062:6; B0910:2–15. Thereafter, Miles had no further involvement with that single-purpose entity. A1061:9–A1062:6; A1967:10–20.[1]

[1] NuVasive's allegations that Miles's interaction with Carlsbad was somehow improper are unsupported by the record and are irrelevant. NuVasive originally claimed that Miles breached his fiduciary duty by agreeing with other NuVasive executives that NuVasive should not acquire Spine but yet personally exploring a potential opportunity to invest in Spine through Carlsbad Partners. A0152–A0154. NuVasive also claimed that Miles disclosed confidential NuVasive information to

Over the next several months, Miles's relationship with Lucier deteriorated. A0649:21–A0654:10. On September 7, 2016, Miles resigned from NuVasive to become the Chairman of Holdings and CEO of Spine. A0655:10–A0656:9; A2292. He planned to join the company with his long-time friend and former NuVasive colleague, Craig Hunsaker. A0654:11–24; A0655:10–A0656:9.

Concerned about the impact of Miles's departure on NuVasive's surgeon customers, NuVasive offered Miles a lucrative compensation package to stay, which he ultimately accepted. A0656:16–A0658:6; A2331; B0244–48; B0825:14–B0829:9; B0847:1–14. As a result, Miles remained with NuVasive while his friend

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Carlsbad, Holdings, or Spine. A0157. NuVasive failed to prove either claim at trial. The evidence showed that every NuVasive executive, and every other major spine company in the industry, passed on acquiring Spine at that time, and so nothing Miles said or did misled or harmed NuVasive in any way. A0617:6–20. Further, Miles only considered a potential investment in Spine through Carlsbad Partners *after* NuVasive had already definitively passed on the acquisition. NuVasive made the decision to pass in February 2016, (*see* A0604:10–A648:24, A2103–57; B0145–242); and it was not until March 2016 that Carlsbad Partners approached Miles (and others) to invest. A0623:7–A648:13; A1058:4–A1062:6; A1962:18–A1963:18; *see also* A0314:5–12; A0595:21–A0597:12. The evidence also proved that the documents NuVasive relied on in support of its disclosure of confidential information claim were created by Carlsbad and the strategy reflected in those documents did not come from Miles. B0909:14–15. Regardless, these facts are irrelevant. NuVasive abandoned these claims after trial and does not raise them on appeal. A1902 (Trial court noting that NuVasive "clarified at post-trial oral argument that the breach of fiduciary duty claim was limited to failure to disclose a passive investment"). NuVasive's statement of facts is rife with such irrelevant, unsupported facts. Holdings and Miles address here only the facts relevant to the issues NuVasive has raised on appeal.

Hunsaker joined Spine without him. A0658:4–24; A0673:3–A0678:16; B0243; B0451–54.

Miles then had no contact with Spine until Hunsaker texted him in March 2017 (A1076:23–A1077:7), when Holdings decided to raise capital through a private investment in public equity (or "PIPE") transaction. A1936:3–15. Spine had continued to struggle financially, and Holdings conducted the PIPE to raise much-needed capital. Upon Hunsaker's invitation, Miles agreed to invest $500,000 in Holdings, primarily to show support to Hunsaker, even though he still believed Spine was not a strong company. A0659:1–A0660:5; A0661:12–23; A2067:23–A2070:8; A2078:7–17. Miles made the investment through an entity named MOM, LLC—"Maker of Men"—that he formed years prior with help from NuVasive employees to acquire his ailing father's landscaping business. A0666:16–A0667:8, A0667:12–17; B0281. He used MOM, LLC to avoid dealing with Lucier, whose personal animosity towards Miles was widely known by this point. A2082:13–16; A2083:1–14; A0667:18–A0668:14.

In total, Holdings raised about $18.9 million through the PIPE offering. B0249. For his investment, Miles received no operational control or input in Spine. A0659:22–A0660:22; A0662:13–A0664:18; A0665:13–A0666:15; B0849:16–25; B0318–19. For that reason, the investment was allowed under NuVasive's Code of Conduct, and so Miles did not report his personal investment to anyone at NuVasive.

Miles and other NuVasive executives had made similar investments in the past without any issue. A0664:19–23; A0667:18–A0668:10; A2078:20–23; B0850:22–B0853:19. NuVasive compares this investment to another investment Miles considered in a company called TrackX Technology LLC, but omits that the TrackX investment included a strategic role for Miles and, at the time, NuVasive was considering purchasing TrackX, which would create the potential for a self-interested transaction. A2755. That is why Lucier "denied" Miles's request to invest in TrackX. A1641.

In 2017, Miles's dissatisfaction at NuVasive continued to grow. A0677:24–A0685:14; B0890:9–B0892:5; B0846:2–20; B0860:14–B0862:3. On September 14, 2017, Miles sought advice from Hunsaker regarding an opportunity to become CEO of a San Francisco company called Nocimed. A0684:5–A0689:20; B0320–44; B0464; B0830:8–18. The conversation rekindled the idea that Miles could, instead, join Hunsaker at Spine. A0684:5–A0689:20; B0469; B0830:8–B0832:3. Although Spine presented serious challenges, Miles could innovate again and, with development help from his close surgeon friends, continue to improve spine surgery. After further discussion, Miles resigned from NuVasive on October 1, 2017, to become Executive Chairman at Holdings and Spine—leaving his $30 million deal with NuVasive for a hopeful but uncertain future. A0684:5–A0689:20, A0692:10–A0694:17; B0345; *see* B0348–50; B0848:15–24.

Lucier feared that NuVasive's surgeon customers would follow Miles to Spine—which is perfectly legal. B0897:18–B0898:2; B0873:10–24; *see* B0498–99. In response, hours after Miles's resignation, Lucier commissioned a "war room" focused on "crushing Alphatec." B0354–55. Lucier emailed his three-part plan of attack to his top executives, which included burying Spine and Miles in expensive, public litigation. B0346–53; B0494–97; B0529–53; B0556–58; B0560–74.

NuVasive filed this litigation days later, alleging seven counts against Miles, including breaches of contract and fiduciary duty, and announced its suit in a press release. B0500–528; *see* A1094:18–A1096:22. Six of NuVasive's seven claims against Miles were either dismissed or dropped before trial. After trial and extensive post-trial briefing, the court ruled in favor of Miles on the remaining claim. A1892. The court found that Miles did not act in bad faith by deciding not to disclose his 2016 passive investment in Alphatec and thus did not breach his duty of loyalty to NuVasive. A1902.

II. Facts Pertaining to Issue 2: Spine Recruits Surgeon Customers and Hires Distributors and Sales Representatives; Holdings Does Not.

When Miles joined Spine, surgeon customers followed. Many had collaborated with Miles and his team for years and were also frustrated by NuVasive's leadership. *See* A1097:4–A1101:13. As surgeons came to Spine, so did distributors and sales representatives. In the medical-device industry, hiring distributors and sales representatives from competitors is commonplace. B0863:20–

B0865:7; B0866:1–B0867:22; B0919:1–12; *see, e.g.*, B0747; B0894:20–B0896:1. NuVasive does it regularly. *Id.* As is relevant here, Spine hired three people from a former NuVasive distributor, Absolute Medical, in Florida (Greg Soufleris, Ryan Miller, and Dave Hawley), two people from a NuVasive distributor, inoSpine, in North Carolina (Michael Jones and Kenneth Kormanis), and two people from a NuVasive distributor, Rival Medical, in Massachusetts (Tim Day and Adam Richard). None of these individuals or entities engaged with Holdings or did any business on Holdings's behalf. A3035; A3146; A3387; B0608–56; B0780–803; B809–12; A0878:8–24 (Hunsaker testifying that there are no distributors of Holdings, and all negotiations and contracts were done on behalf of Spine).

***Florida*:** NuVasive's key former surgeon customer in Florida—Dr. Sawin—testified that he moved his business to Spine because he was frustrated with how NuVasive was being operated. B0902:1–B0903:4. When Dr. Sawin's former NuVasive distributor Soufleris approached Spine, Spine's General Counsel—then Hunsaker—advised him to secure independent legal counsel, which Soufleris did. B0554–55. Hunsaker then corresponded with Soufleris's counsel about what Spine needed to do to ensure proper compliance with any valid restrictive covenants. B0554–55; B0559; B0582–85; *see also* B0575–81. To avoid causing a disclosure of confidential NuVasive information, Hunsaker did not request and did not review NuVasive's contracts with Absolute Medical. A1127:22–A1128:10; *see* A2856

("Confidential Information shall also include the terms of this Agreement."). Hunsaker also did not request and did not review NuVasive's contracts with Absolute Medical's sales representatives, Hawley and Miller, because he was told no such agreements were in effect. A0943:8–17. Instead, based on the information provided by Soufleris's counsel, Hunsaker drafted Soufleris's contract to exclude his former NuVasive territory. B0582–85; B0608–32. Spine paid Soufleris's newly formed distributorship, Absolute Medical Systems, standard commission rates and granted potential equity in Holdings depending on whether it hit sales targets pursuant to a "distributor inducement plan." B0608–32; A1138:20–A1146:2. The "distributor inducement plan" adopted by the Holdings's Board was designed to help Spine recruit and incentivize distributors generally and not to persuade distributors to breach their existing agreements. A1146:20–A1147:10; A2797–2823. As is common industry practice, including NuVasive's, Spine agreed to indemnify Soufleris and Absolute Medical Systems in future litigation, but with restrictions. B0586; B0608–32; B0816:16–23; B0893:1–21; B0920:22–B0923:1; *see* A3168. Because counsel represented that Hawley and Miller were not subject to any applicable restrictions, *see* A0943:8–21, no restrictions were included in their Spine contracts. B0633–80. Nor did Spine agree to indemnify either in litigation against NuVasive. B0633–80; B0833:24–B0835:3; B0836:2–B0837:25. There was no need—as far as Spine understood, Hawley and Miller were free to compete.

***North Carolina*:** In North Carolina, Spine recruited three former NuVasive surgeon customers—Drs. Jones, Ditty, and Hunter—to move their business to Spine. *See, e.g.*, A3198; A3207–09; B0683–96; B0698–B0716; B0718–29; B0751–55. Spine then hired Kormanis and Jones, two sales representatives who formerly worked for inoSpine, a distributor that provided these surgeons with NuVasive products. *See, e.g.*, A3204; B0756–803. Jones, who was represented by counsel, and Kormanis provided their inoSpine agreements to Spine. A3193–95; B0697; B0717. Both agreements were terminable at will. A3193–95; B0697. But each had noncompete obligations in certain territories to inoSpine (and NuVasive as a third party). A3193–95; B0697. To the extent valid and enforceable, to comply with Jones's and Kormanis's respective noncompete obligations, Spine followed industry practice and swapped their territories. B0681–82; B0756–803. Spine agreed to its standard commission rates, and to indemnify Jones and Kormanis subject to the same restrictions on honoring their noncompete obligations. B0756–803; *see* B0817:23–B0819:1.

***Massachusetts*:** NuVasive's key former surgeon customer in Massachusetts—Dr. Glazer—started using Spine products in surgery nearly one year before his former NuVasive sales representative—Tim Day—joined Spine. B0804–08 (first surgery July 11, 2018); B0809–12 (Day employed April 1, 2019). When Day and his associate, Richard, did join, Hunsaker followed the same cautious approach as he did in Florida. He advised Day to secure counsel and, based on counsel's representation of the restrictive covenants, assigned Day and Richard to territory outside their restricted NuVasive territories. A1170:3–A1171:3, A0997:9–16; B0809–12. Again, Spine agreed to its standard commission rates and to indemnify Day and Richard subject to the same restrictions on honoring their noncompete obligations. B0809–12; A3387-A3392; *see* B0817:23–B0819:1. Spine did not contract with Day's former distributorship, Rival Medical.

Despite these facts, NuVasive asserted claims for tortious interference with some of NuVasive's sales representative and distributor contracts, as well as related claims under Florida's and North Carolina's unfair trade statutes, against Holdings. NuVasive asserted these same claims against Spine in the California case, where, after six weeks, the jury found Spine not liable on all counts except for tortious interference with NuVasive's contract with one sales representative in North Carolina, awarding minimal damages. At the California trial, NuVasive represented to the jury that the alleged wrongdoing was conducted by Hunsaker, Miles, and others in their capacity as employees for Spine and therefore that Spine should be held liable. B0081–92. But in Delaware, and on appeal here, NuVasive says that Holdings should be held liable for the same conduct by the same individuals. The trial court found that the evidence proved that the individuals involved in the alleged wrongdoing acted on behalf of and in their capacity as employees of Spine—not employees of Holdings, a holdings company with no operations—and therefore ruled in favor of Holdings on each claim. A1892; A1882.

ARGUMENT

I. The Trial Court Correctly Determined That Miles Did Not Breach His Fiduciary Duty.

A. Question Presented

Did the trial court clearly err in finding, based on the trial evidence, that Miles did not act in bad faith by not disclosing his passive investment in Alphatec—an investment that the NuVasive concedes he was allowed to make? A1738–39; A1901–09.

B. Standard of Review

The trial court's conclusion regarding Miles's duty of loyalty is "fact dominated," and thus is entitled to substantial deference and should not be overturned because it is not "clearly erroneous" or not the "product of a logical and deductive reasoning process." *See Cede & Co. v. Technicolor,* 634 A.2d 345, 360 (Del. 1993) (citing *Citron v. Fairchild Camera & Instrument Corp.*, 569 A.2d 53, 64 (Del. Supr. 1989) and *Levitt v. Bouvier,* 287 A.2d 71, 673 (1972)).

To try to convert the trial court's factual finding into a legal issue subject to de novo review, NuVasive accuses the trial court of misidentifying the elements of a breach of the duty of loyalty claim. App. Br. at 18. No so. The trial court correctly stated that "[a] plaintiff can plead a claim for breach of the duty of loyalty by alleging facts demonstrating that the fiduciary failed to pursue the best interests of the corporation and its stockholders and therefore failed to act in good faith." A1900 (citing *In re Orchard Enters. Inc. S'holder Litig.*, 88 A. 3d 1, 33 (Del. Ch. 2014)). To prove Miles did not act in good faith, NuVasive had to (and failed to) prove that Miles "intentionally act[ed] with a purpose other than that of advancing the best interest of the corporation." *Stone v. Ritter*, 911 A.2d 362, 369 (Del. 2006).

C. Merits of Argument

The trial court correctly determined that Miles did not breach his fiduciary duty, because there was "no evidence that, in his capacity as a NuVasive officer or director, Miles failed to advance the best interests of NuVasive and its stockholders." A1902. The trial evidence proved that (1) Miles had no obligation to disclose the investment he chose not to disclose (A0666:16–A0667:8; B0281), (2) the investment did not create a conflict of interest (A1902 (noting that the investment was "purely passive" that Miles "held no decision making role at Holdings," and that he could not have used a position resulting from his investment to cause Holdings to compete against NuVasive)), and (3) Miles's behavior, including his reasons for not affirmatively disclosing the investment (that he had no obligation to disclose) did not demonstrate bad faith.

1. Miles Did Not Have an Affirmative Duty to Disclose His Investment.

After years chasing various, failed breach of duty theories, NuVasive now concedes that Miles's passive investment in Alphatec was allowed under his contract and was not a breach of Miles's duty of loyalty. Instead, NuVasive argues that Miles still should have affirmatively told NuVasive about the investment. But the trial evidence proved that Miles did nothing to actively conceal his investment. In fact, Miles made the investment through an investment vehicle that NuVasive helped Miles create. A0667:12–17.

Moreover, this investment was not the sort of information that an agent is required to disclose, because it was not information that Miles knew or should have known NuVasive would want to have. *See Metro Storage Int'l v. Harron*, 275 A.3d 810, 850–51 (Del. Ch. 2022) (quoting Restatement of Agency § 8.11 cmt. b for the notion that "[a]n agent owes the principal a duty to provide information to the principal that the agent knows or has reason to know the principal would wish to have"). The investment had nothing to do with NuVasive and was permitted under NuVasive's Code of Conduct. B0281 (NuVasive's Code of Conduct specifying that employees should not have a "significant investment in a customer, supplier, or competitor," defining a "significant investment" as one that gives the investor "some decision-making power," and imposing no disclosure requirements).

2. Miles's Decision Not to Inform NuVasive Was Not Contrary to NuVasive's Best Interests.

Because Miles did not actively conceal his investment, Miles's decision not to inform NuVasive of his personal investment could only have been a breach of his duty to NuVasive if doing so was contrary to NuVasive's best interests. *See Cede & Co.*, 634 A.2d at 361 ("[T]he duty of loyalty mandates that the best interest of the corporation and its shareholders takes precedence over any interest possessed by a director, officer, or controlling shareholder and not shared by the stockholders generally."). It was not. It had no impact on NuVasive because "[t]he investment was purely passive." A1902. It gave Miles no decision-making role. A0659:22–A0660:22; A0662:13–A0664:18; A0665:13–A0666:15. And the investment was relatively insignificant—$500,000 contributed to a $18.9 million PIPE fund. A0659:1–A0660:5, A0661:12–23; B0249; *see* A0659 (Miles testifying that he expected no return on the investment). It did not give Holdings a competitive advantage against NuVasive. Lucier may have wanted the information, based on his own personal animus towards Miles, but there was no business reason for NuVasive to need to know about the investment.

NuVasive relies on *Metro Storage* to argue that non-disclosure was against NuVasive's best interests. App. Br. at 20 (citing *Metro Storage Int'l v. Harron*, 275 A.3d 810 (Del. Ch. 2022)). But the court's opinion in *Metro Storage* directly contradicts NuVasive's argument that the trial court made a legal error by considering evidence related to Miles's reasons for not affirmatively notifying NuVasive of his investment. In *Metro Storage*, the court held that, to prove a breach of fiduciary duty claim, a plaintiff must prove that the defendant consciously and intentionally disregarded his duty to act in the company's best interests. *Metro Storage*, 275 A.3d at 842. The *Metro Storage* court also confirmed that "[t]he duty of loyalty includes a requirement to act in good faith," which "may be shown . . . where the fiduciary *intentionally acts with a purpose* other than that advancing the best interests of the corporation." *Id.* And NuVasive quotes (in bold) the *Metro Storage* court's finding that the defendant's failure to disclose information in that case was a breach of the duty of loyalty "*because of*" the defendant's reason for not disclosing it: "Harron kept his consulting secret precisely because he knew that he was not supposed to be doing it and that the Nagels would not authorize it." App. Br. at 20 (quoting *Metro Storage*, 275 A.3d at 851).

Here, NuVasive insists that Miles did not disclose the investment because he knew he was not supposed to do it, but that is not what the trial evidence proved. NuVasive's position rests on the fact that Miles previously considered investing in another company, TrackX Technology LLC. Miles discussed this potential investment with Lucier, and Lucier said that he thought it would create a conflict of interest. A2754–55. That was because the investment would have given Miles a "strategic role" in TrackX and NuVasive was considering acquiring TrackX, which would create the potential for a self-interested transaction. A2755. Miles was not taking a strategic role with Holdings, and NuVasive had already passed on acquiring it, so there was no similar conflict here with Miles's passive investment in Holdings. Because of these material differences, that Miles discussed the potential TrackX investment with Lucier and that Lucier "denied" it says nothing about whether Miles had a duty to disclose his passive investment in Holdings.

Following *Metro Storage*, the trial court here appropriately considered Miles's reasons for not disclosing his investment and found that, based on the evidence, it was not contrary to NuVasive's interests. A1901–02. The court found that Miles made the investment to support a friend (*see* A1903–04)—the investment had nothing to do with NuVasive, and so there was no reason to disclose it to NuVasive. The trial court also found that Miles did not disclose the investment to avoid unnecessary personal conflict with Greg Lucier, not because he thought NuVasive would forbid the investment and not because he thought NuVasive had any interest in knowing that Miles made the passive investment. A1904. Both facts, the court determined, confirm that Miles was not acting in bad faith—he did not "intentionally act[] with a purpose other than that of advancing the best interests of the corporation." *Stone*, 911 A.2d at 369; *see In re Bioclinica, Inc.*, 2013 WL 5631233, at *5 (Del. Ch. Oct. 16, 2013) (noting that the "duty to act in good faith is part of the duty of loyalty" and that "[b]reaches of the duty of good faith include 'situations where the fiduciary intentionally breaks the law, where the fiduciary intentionally acts with a purpose other than that of advancing the best interests of the corporation, or where the fiduciary intentionally fails to act in the face of a known duty to act, demonstrating a conscious disregard for his duties.'").

3. NuVasive's Other Arguments Do Not Justify Disturbing the Court's Well-Reasoned Decision

NuVasive asks this Court to replace the trial court's factual findings with NuVasive's own theory for why Miles did not disclose the investment. Although NuVasive says in one paragraph that "Miles' motive are legally immaterial," in the very next paragraph NuVasive insists that "[w]hat matters" is what NuVasive asserts was Miles's motive. App. Br. at 19 ("What matters is that while serving as NuVasive's Vice Chairman, Miles intentionally concealed his investment ***and did so because*** he knew NuVasive would not authorize it.") (emphasis added). But NuVasive did not prove that theory at trial, cites no supporting evidence on appeal, and offers no explanation now for how the trial court's factual finding is clearly erroneous. *See* App. Br. at 19 (citing Miles's testimony that he did not disclose the investment because he wanted to avoid personal conflict with Lucier); *id.* at 21 (asserting without citation that Miles "kn[ew] that permission would be denied"). In short, the trial court's analysis is the same as that employed in *Metro Storage*, but the outcome is different based on the unique facts of that case—a point NuVasive misses.

NuVasive's reliance on *Guttman v. Huang* and *In re Walt Disney* is similarly unavailing. In *Guttman*, the court addressed whether the plaintiffs had adequately pleaded a *Caremark* claim, and noted in a footnote that "[t]here might be situations when a director acts in subjective good faith and is yet not loyal (e.g., if the director is interested in a transaction subject to the entire fairness standard and cannot prove financial fairness)." *Guttman v. Jen-Hsun Huang*, 823 A.2d 492, 506 n.34 (Del. Ch. 2003). Likewise, in *In re Walt Disney* the court addressed whether Delaware law imposes on officers and directors a duty of good faith separate from the duties of care and loyalty. *In re Walt Disney Co. Derivative Litig.*, 907 A.2d 693, 745, 753 (Del. Ch. 2005). In that context, the court wrote that "[i]t makes no difference the reason why the director intentionally fails to pursue the best interests of the corporation" before finding that each defendant had acted in what he believed was the best interests of the company and therefore had not breached his duties. *Id.* at 754. In both cases, the courts addressed whether an officer's reason for taking some action against their companies' best interests should be considered ***after*** it is established that the director has "intentionally fail[ed] to pursue the best interests of the corporation." *Id.* Here, the trial court examined the facts related to Miles's decision not to disclose the investment to determine ***whether*** Miles "intentionally failed to pursue the best interests of the corporation," and determined he did not. A1902.

NuVasive's policy arguments fail, too. First, nothing in the trial court's ruling "excuses" a breach of the duty of loyalty. The trial court did not find that there was a disloyal act done for an innocuous reason; the trial court found that there was no disloyal act. A1905.

Second, the obligation to act in the best interest of the company means that an officer cannot take any action ***against*** the best interest of the company; it does not mean that every action he takes in his personal life must ***benefit*** the company. *See Jeter v. Revolutionwear, Inc.*, 2016 Del. Ch. LEXIS 106, at *38–39 (Del. Ch. July 19, 2016) ("Corporate fiduciaries 'are not permitted to use their position of trust and confidence to further their private interest' ***in ways inimical to the corporation***.") (emphasis added) (quoting *In re Orchard Enters., Inc S'holder Litig.*, 88 A.3d 1, 33 (Del. Ch. 2014)); *Guth v. Loft, Inc.*, 5 A.2d 503, 510 (Del. 1939) (defining an officer's duty to act in the best interest of the company as the obligation "not only affirmatively to work to protect the interests of the corporation . . . but also to refrain from doing anything that would work injury to the corporation, or to deprive it of profit or advantage . . . ."). Here, the trial court found that Miles's decision not to disclose his passive investment did not negatively impact NuVasive and thus was not against the company's best interest. A1903. Miles did not usurp any opportunity from NuVasive by not disclosing his investment, he did not take a controlling interest in either Holdings or Spine, and his investment did not make either Holdings or Spine a materially stronger competitor to NuVasive. A0660:10–16 (Miles testifying that that his investment gave him "[z]ero" operational control or input in Alphatec Spine or Alphatec Holdings and describing it as a "completely passive investment"); A0646:4–15 (Miles describing Alphatec Spine at the time of his investment as a "profoundly dysfunctional company" that everyone in the industry "passed on"); A1079:24–A1080:8 (Hunsaker testifying that Miles's investment gave Miles no controlling interest, strategic role, or decision making authority). NuVasive's position, were it correct, would bar officers and directors from all sorts of personal conduct that has no impact on the companies for which they work.

II. The Trial Court Correctly Determined That Holdings Cannot Be Held Liable for Torts Allegedly Committed by Its Subsidiary.

A. Question Presented

Did the trial court clearly err in finding "[b]ased on the record at trial" that "Holdings is not the entity that took the actions Plaintiff complains of here"? A1880.

B. Standard of Review

NuVasive challenges the trial court's factual findings about the division of work between Spine and Holdings and its determination of the credibility of certain witnesses in detailing the role that Holdings played with respect to Spine. These questions are issues of fact, which "will not be set aside by a reviewing court unless those factual determinations are clearly erroneous." *Cede & Co. v. Technicolor, Inc.*, 758 A.2d 485, 491 (Del. 2000); *see also Bhole, Inc. v. Shore Invs., Inc.*, 67 A.3d 444, 449 (Del. 2013). Moreover, "[w]hen factual findings are based on determinations regarding the credibility of witnesses . . . the deference already required by the clearly erroneous standard of appellate review is enhanced." *Cede & Co.*, 758 A.2d at 491. "In the exercise of judicial restraint, the applicable standard of appellate review requires this Court to defer to such factual findings, even though independently we might have reached different conclusions." *New Castle Cnty. v. DiSabatino*, 781 A.2d 687, 690–91 (Del. 2001).

NuVasive incorrectly asserts that this Court should apply a de novo review because interpreting contracts is a question of law. App. Br. at 24. Although contract interpretation questions do warrant de novo review, NuVasive's arguments on appeal do not require contract interpretation.

C. Merits of the Argument

Again, NuVasive misconstrues the trial court's opinion to fit its own narrative. The trial court did not, as NuVasive says, "exonerate" Holdings for acts of its officers because the conduct was intended to increase the profits of a subsidiary. Rather, the trial court found, based on the trial evidence, that Holdings officers did not commit "the actions Plaintiff complains of here. Instead, those actions were taken by employees acting on behalf of Spine, the entity Plaintiff has sued on those grounds in the California Action." A1880. This factual finding is not clearly erroneous—it is based on the trial court's comprehensive consideration of all the trial evidence, instead of just the handful of documents NuVasive focuses on to construct its own narrative. As the evidence reflected, "Holdings is a passive entity that holds subsidiaries, including Spine." A1881. It has no business operations. A1026:22–A1028:12. Holdings does not make or sell spine medical devices, recruit people to make and sell spine medical devices, or engage surgeons to consult on spine medical device product development. A1037:3–6 ("Holdings doesn't operate anything. It doesn't sell anything. It doesn't engage in . . . contracts."); B0937–38 ¶¶ 16, 18–20.

And as the trial court recognized, NuVasive spent six weeks arguing to a California jury that Spine, not Holdings, was liable for exactly the same alleged conduct for which it now claims Holdings committed.[2] Even so, NuVasive now cherry-picks two pieces of evidence to try to establish that Holdings was directly liable: the employment contracts between Holdings and Miles and Hunsaker and the "distributor inducement plan," which was designed to help Spine recruit distributors generally. App. Br. 24–27. The trial court considered this evidence at trial and found it insufficient to establish Holdings's direct liability. A1887–88. This Court should uphold the trial court's decision and deny NuVasive's appeal.

1. The Employment Contracts Do Not Establish That Miles, Hunsaker, or Rich Acted Solely for Holdings.

NuVasive argues that Holdings is liable here because Miles's, Hunsaker's, and former Holdings and Spine CEO, Terry Rich's, employment agreements, which were included as part of SEC filings, reflect that Holdings, not Spine, employed them. App. Br. at 24; *see* A1688–69. The trial court rejected this argument, finding instead that the evidence showed that "to the extent that the executives were facially employed by Holdings engaged in the recruitment of sales representatives and distributors, they took these actions ***entirely on behalf of Spine***." A1888 (emphasis added). In reaching this conclusion, the court considered, among other evidence, that Hunsaker testified that some Spine employees' employment agreements were

[2] The jury found against NuVasive on all but one count, B0081–92, and awarded minimal damages. NuVasive now seeks a second chance at recovery, disregarding corporate form along the way. This Court should reject its attempt.

"mistakenly drafted under Holdings' name." *See* A1888 (citing A0885:4–7; A1032:22–A1033:4); *see also* A1030:4– A1033:4 (clarifying that Holdings only has three executives, so any former employment agreement between Holdings and anyone other than those three executives "were mistakenly drafted").

The trial court did not err in reaching this decision. As the evidence showed, to the extent that Miles, Hunsaker, or Rich—the only individuals alleged to be involved with the conduct here who were employed by Holdings—were engaged in the alleged conduct at all, they did so as agents of Spine, not Holdings. A1034:2–6. Miles testified that he performs his "daily operational activities" for "Alphatec Spine." A0519:22–A0520:24. When Miles "meet[s] with spine surgeons" and works on "develop[ing] spine technology," he does so as "chief executive officer for Alphatec Spine" and those with whom he meets know that he represents Spine. *Id.* Likewise, Hunsaker testified that he "viewed [his] efforts as 100 percent . . . spent in the interest of Alphatec Spine, the operating entity," except for his corporate-secretary obligations for Holdings, which are irrelevant. A0883:6–13; *see also* A1023:1–10 (Hunsaker confirming that all members of his team are employed by Spine, not Holdings).[3]

[3] Rich did not testify at the Delaware trial. *See generally* A0190–A1717.

Ultimately, because Holdings does not conduct any business and simply "holds subsidiaries," none of Miles's, Hunsaker's, or Rich's actions could have been done on Holdings's behalf—they must have been taken on Spine's behalf. As a result, the court's decision was not clearly erroneous. *See Eagle Force Holdings, LLC v. Campbell*, 235 A.3d 727, 737 (Del. 2020) ("Plaintiffs' dissatisfaction with the weight given to this evidence does not constitute reversible error.").

To downplay the evidence supporting the court's decision, NuVasive argues that the trial court committed reversible error by not conducting an analysis of "the doctrine of mistake" when it credited Hunsaker's testimony that certain employment agreements were mistakenly drafted with Holdings and not Spine. App. Br. at 25. As an initial matter, NuVasive incorrectly recounts Hunsaker's testimony on this point. Hunsaker did not testify that all of Holdings's contracts with executives were mistakes. Hunsaker testified that there are three recognized Holdings officers: the chairman, the chief financial officer, and the general counsel and corporate secretary. A1030:4–A1033:4. Each of these officers holds positions with Spine as well. A1031:1–18. Hunsaker served as the general counsel and corporate secretary for Holdings between 2016 and July of 2023, as well as general counsel for Spine. A0865:2–13; A0867:12–18. Rich served as CEO of both Holdings and Spine from 2016 to 2018, when Miles took over the roles. A2334:20–25. The contracts Hunsaker testified were "mistakenly drafted" were the employment agreements for

Terry Rich, after Miles took over as CEO in 2018, as well as two other Spine employees Jon Allen, and Brian Snider. Once Rich stepped down from the CEO role, he was no longer an executive of Holdings and only held the position of COO and president at Spine. A2335:1–4. Neither Allen nor Snider were ever Holdings executives. *See* A0871:6–A0876:18; A1032:6–1033:4.

Regardless, NuVasive fails to cite any law to establish that failing to consider the doctrine of mistake here requires this Court to reverse the trial court's opinion. And, more importantly, the trial court's decision to find for Holdings does not principally rely on Hunsaker's testimony. While the court recognizes that "Hunsaker testified that the employment agreements were mistakenly drafted under Holdings's name," in the very next sentence of its opinion, it states: "***[m]ore pertinently***, testimony presented at trial demonstrates that, to the extent that executives facially employed by Holdings engaged in the recruitment of sales representatives and distributors, they took those actions entirely on behalf of Spine." A1888.

The court also recognized that it is "common sense" that Miles and Hunsaker "were acting on behalf of Spine, rather than its non-operating holding company" because "Holdings has no commercial operations." A1888 at n.52. Therefore, even if it were an error for the court to consider Hunsaker's testimony, that was not the only, or strongest, evidence that the trial court considered in reaching its conclusion. Thus, the court's lack of analysis of the doctrine of mistake, even if that were an error (it is not), does not require reversal. *See AIG Specialty Ins. Co. v. Conduent State Healthcare, LLC*, 2025 WL 369450, at *8 n. 71 (Feb. 3, 2025) (upholding the trial court's decision because "the court's analysis was more than sufficient to support its ruling" despite its failure in citing the record as to one factor of its overall conclusion).

2. The Inducement Plan Does Not Create Liability.

NuVasive's argument premised on the idea that Holdings "financed" the alleged conduct fails, too. NuVasive's principal evidence that Holdings financed its executives' alleged conduct is an inducement plan adopted by Holdings's Board in 2017 to incentivize distributors by providing them warrants to purchase shares of Holdings's stock at a set exercise price.[4] *See* App. Br. at 26. The only distributor that NuVasive argues received such an equity agreement pursuant to the inducement plan is Soufleris. *See* A1644–45.

As a threshold matter, NuVasive waived this argument by not addressing it in post-trial briefing. *See Oxbow Carbon & Minerals Holdings, Inc. v. Crestview-Oxbow Acquisition, LLC*, 202 A.3d 482, 502 n.77 (Del. 2019) ("The practice in the

[4] This so called "incentive" was of no immediate significant value based on the company's performance at that time and would only realize if Spine were successful. A1144:24–A1145:8 (Hunsaker testifying that the warrants on the day they were granted "were worth zero in terms of their actual value" and that their value "is entirely dependent on the price of the stock. As [the stock value] goes up, [the warrant] becomes more valuable; as [the stock price] goes down; [the warrant] becomes less valuable.").

Court of Chancery is to find that an issue not raised in post-trial briefing has been waived, even if it was properly raised pre-trial."). At most, NuVasive noted this argument in one bullet in its pre-trial brief, *see* B0069, then abandoned it. NuVasive's attempt to cling to an argument that it waived does not provide this Court any basis to disturb the well-reasoned conclusion drawn by the trial court. And while the Court may consider an issue otherwise waived "if the interests of justice require," "this narrow exception" only applies to "material defects . . . which clearly deprive an accused of a substantial right, or which clearly show manifest injustice." *Protech Minerals, Inc. v. Dugout Team, LLC*, 284 A.3d 369, 378–79 (Del. 2022); *see* Del. Super. Ct. R. 8. NuVasive cannot show that a material defect occurred here because the trial court directly addressed the distributor inducement plan in its opinion. *See* A1887 ("Although Holdings approved a distributor inducement plan which ratified the equity component to AMS's agreement, the plan was generic and does not establish that Holdings itself took any action to recruit NuVasive sales representatives, nor that it directed Spine to do so."). As such, this Court need not consider NuVasive's argument as it has been waived.

Even if NuVasive had not waived this argument, NuVasive's theory that Holdings directly and intentionally interfered with NuVasive's contract with Absolute Medical by funding the distributor inducement plan is unsupported by the evidence. As noted above, the record contains no evidence that the Holdings Board recruited distributors, negotiated or executed any contracts, or even knew of distributor agreements, let alone encouraged distributors to breach their agreement. Moreover, the evidence proves the inducement plan was adopted only after Soufleris created a new entity to work with Spine and entered an agreement with Spine to do so.[5] A1146:20–A1147:10; A2797–2823. Accordingly, the inducement plan cannot provide the basis of Holdings's liability here. *See Aqua Connect, Inc. v. Code Rebel, LLC*, 2012 WL 1535769, at *4 (C.D. Cal. Apr. 27, 2012) ("Under California Law, a party cannot induce a breach of contract after another party has already breached the contract.") (citing *Pac. Gas & Elec. Co. v. Bear Stearns & Co.*, 50 Cal. 3d 1118, 1126 (1990)); *see also Cellars v. Pac. Coast Packaging, Inc.*, 189 F.R.D. 575, 580–81 (N.D. Cal. 1999) (noting that "[a]s a matter of logic," post-breach conduct cannot induce a breach).

[5] Moreover, a California jury, after evaluating all of the evidence against Spine concluded that Spine did not do anything wrong in recruiting Soufleris and in contracting with Absolute Medical Systems. *See* B0081–92.

CONCLUSION

For these reasons, the Court should uphold the trial court's ruling in full.

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